No. 83-1080

In the Supreme Court of the United States

OCTOBER TERM, 1983

IOWA POWER & LIGHT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Interstate Commerce Commission properly exercised equitable authority to allow a rail freight tariff to take effect retroactively because the railroad had been prevented from collecting a rate increase solely because of a legal error committed by the Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 712 F.2d 1292. The decision of the Interstate Commerce Commission (Pet. App. 11a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on August 3, 1983. Justice Blackmun extended the time for filing a petition for a writ of certiorari to December 31, 1983, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, petitioner and the Burlington Northern Railroad Company entered into an agreement on the rate ($7.62 per ton) the railroad would charge for hauling coal from a mine in Wyoming to petitioner's electric generating plant under construction in Council Bluffs, Iowa (Pet. App. 2a). In 1978, when the coal movement began, the railroad filed a tariff with the Interstate Commerce Commission, which contained a substantially higher rate ($10.95 per ton) for moving coal on that line. Petitioner then complained to the Commission that the rate that the railroad established by tariff was unreasonably high because it exceeded the contract rate. After conducting a hearing, the Commission found that the agreed rate was the maximum reasonable rate, and prescribed that rate for future movements.[1] The railroad thereafter amended its tariff to reflect the agreed rate (*ibid.*).

After the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, took effect, the railroad submitted to the ICC a new tariff, in which the railroad proposed, effective November 1, 1981, to increase the rate for the traffic of coal between Wyoming and Iowa. The railroad maintained that its proposed higher rate was below the level at which the ICC acquires jurisdiction under the Staggers Act to determine whether a rail rate is reasonable. See Section 202 of the Staggers Act, 49 U.S.C. (Supp. V) 10709(d).[2]

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[1]On appeal, the Court of Appeals for the Eighth Circuit affirmed the Commission's order. *Iowa Power & Light Co.* v. *Burlington Northern R.R., Inc.*, 647 F.2d 796 (8th Cir.), cert. denied, 455 U.S. 907 (1982).

[2]Under Section 202(d) of the Staggers Act, 49 U.S.C. (Supp. V) 10709(d), a rail carrier's rates are not subject to ICC review unless the carrier has market dominance. But the Commission cannot find market dominance if the rate the carrier charges is below a specified revenue-to-variable cost percentage—165% for the period involved in this case. 49 U.S.C. (Supp. V) 10709(d). The railroad contended that the proposed ratio did not exceed that percentage.

Petitioner asked the Commission to reject the tariff before it took effect, pursuant to 49 U.S.C. (Supp. V) 10762(e).[3]

The Commission rejected the proposed tariff because it violated the ICC's 1980 rate prescription order (Pet. App. 3a-4a). The Commission held that, even though the proposed tariff rate was allegedly below the level at which the ICC had jurisdiction to determine the reasonableness of a rail carrier's rates, the prescription order was still binding and required the tariff to be rejected. Because of the Commission's action, the proposed higher tariff rate never took effect (Pet. App. 2a-3a).

The United States Court of Appeals for the District of Columbia Circuit reversed the Commission's decision to reject the railroad's tariff. *Burlington N.R.R.* v. *ICC*, 679 F.2d 934 (D.C. Cir. 1982). The court held that "when a rate increase is tendered to the ICC after the effective date of the Staggers Act and the tendered rate is allegedly below the Section 202 [jurisdictional] threshold, the Commission may not reject the rate simply because it is above the level

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[3]Petitioner also filed a contract action for damages for the railroad's breach of the 1976 rate agreement. *Iowa Power & Light Co.* v. *Burlington Northern R.R.*, Civ. No. 81-526-B (S.D. Iowa, Nov. 22, 1983), slip op. 1 (a copy of the district court's opinion has been lodged with the Clerk of the Court). On November 22, 1983, the district court ruled in petitioner's favor, holding that the contract for the rates governing the coal movements was valid (slip op. 19, 24-25). The district court enjoined the railroad from continuing to breach the contract by doing or failing to do any act that would cause the tariff rate to be different from that specified in the contract (*id.* at 25). The district court also ordered the railroad to refund "all monies received by it from Iowa Power under tariffs for unit train coal transportation from Belle Ayr, Wyoming, to Council Bluffs Unit No. 3 in excess of the rates specified in the contract" (*ibid.*). Notwithstanding the district court's order, the railroad apparently is of the view that the district court's decision requires it to repay petitioner only $5,165,705.38 of the $9,067,065.26, petitioner paid in July 1983 (Pet. 4). The railroad has filed a notice of appeal from the district court's judgment.

specified in an outstanding prescription order or a pre-[Staggers] act Rate Agreement" (679 F.2d at 942).

2. After the court of appeals' remand to the Commission, the railroad submitted a new tariff that would have established the previously filed rate and would have applied it retroactively to November 1, 1981—the date the erroneously rejected tariff would have taken effect. At petitioner's request, a Commission employee board rejected the new tariff for failure to provide the statutorily required 20 days' notice for filing a rate increase, 49 U.S.C. (Supp. V) 10762(c)(3) (Pet. App. 11a).

The railroad appealed to the full Commission, which granted review (Pet. App. 11a-19a). The Commission held that it would be a proper exercise of its equitable powers to make the railroad whole to permit the tariff to take effect retroactively. The Commission pointed out that it was its error alone that had prevented the railroad from collecting the higher tariff rate beginning November 1, 1981 (*id.* at 3a,16a). The ICC allowed the railroad to resubmit the tariff, but required it to provide 20 days' notice in order to afford petitioner the opportunity to seek a Commission order suspending and investigating the proposed rate under 49 U.S.C. (Supp. V) 10707 (Pet. App. 13a). The Commission also stated that it would establish a fair schedule for petitioner's payment of the sum it owed the railroad for the retroactive period (*id.* at 19a).

The court of appeals affirmed (Pet. App. 1a-10a).[4] The court determined that the Commission's action "did not

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[4]While the review proceeding was pending, the railroad resubmitted its tariff and petitioner protested it. The Commission declined to suspend or investigate it, and on February 10, 1983, the tariff took effect nunc pro tunc to November 1, 1981. The Commission also determined a payment schedule and interest rate for the sum petitioner owed the railroad. On July 12, 1983, petitioner paid the railroad $9,067,065.26, which was the full amount it owed for the retroactive period (Pet. 4).

impermissibly conflict with the Interstate Commerce Act, and was not arbitrary or capricious" (*id.* at 1a).

The court rejected petitioner's argument that the Commission's order contravened 49 U.S.C. (Supp. V) 10761(a), which limits the rate a carrier may charge a shipper to the rate in effect under a tariff. The court reasoned that the purpose of the provision was to protect shippers against discriminatory rates and that there was no possibility of discrimination in this case since petitioner was the only shipper served under this rate (Pet. App. 4a-6a). The court also rejected petitioner's claim that the Commission's order violated the related "filed rate doctrine," which prohibits the carrier from charging a rate not on file with the Commission. The court reasoned that the retroactive rate did not undermine the two policies that underlie that doctrine—preservation of the ICC's primary jurisdiction and the need to insure that the ICC is aware of the rates charged by the regulated entities (Pet. App. 6a-7a). The court noted that the Commission was fully aware of the railroad's proposed rate at all times. Finally, the court held that the Commission's order was a reasonable exercise of its inherent authority to "undo what is wrongfully done by virtue of its order" (Pet. App. 8a, quoting *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)).

ARGUMENT

The decision of the court of appeals — that the Commission properly exercised its narrow equitable authority to undo its own legal errors — is a reasonable interpretation of the statutory scheme governing the Commission's delegated power. Moreover, the decision conflicts with no decision of this Court or any other court of appeals. Finally, we note that it is at least arguable that the resolution of the issue will be irrelevant to petitioner in this case, who, in light of the disposition of its contract action against the railroad, may

very well recover from the railroad the full amount paid pursuant to the Commission's order under attack here. Accordingly, further review of the decision below by this Court is unwarranted.

1. Petitioner argues (Pet. 5-8) that the court of appeals erred in not holding that 49 U.S.C. (Supp. V) 10761(a) prohibits the Commission from modifying an effective rate retroactively on behalf of a carrier. It claims that 49 U.S.C. (Supp. V) 10761(a) and its predecessor have been interpreted consistently by both the Commission and this Court as a flat ban on the kind of relief the Commission provided in this case.

Petitioner's contention ignores, however, the reasoning of the court of appeals that the flat prohibition in 49 U.S.C. (Supp. V) 10761(a) was intended only "to prevent carriers from discriminating among shippers" (Pet. App. 5a). See *Lowden* v. *Simonds-Shields-Lansdale Grain Co.*, 306 U.S. 516, 520-521 (1939) and *Louisville & N.R.R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915). Petitioner makes no effort to challenge that holding. Nor does petitioner dispute the court's conclusion that petitioner is "the only shipper involved with [the railroad] in the disputed transaction, and clearly there is no danger of rate discrimination as a result of the ICC's order" (Pet. App. 5a).

2. Petitioner argues (Pet. 8-10) alternatively that the decision below violates the filed rate doctrine, which is designed to protect the shipper from unexpected retroactive charges in rates for shipments it already authorized. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

Again petitioner completely ignores whether the reason for the prohibition against imposing unfiled rates has any application to this case. See *Maine Public Service Co.* v. *FPC*, 579 F.2d 659, 666-667 (1st Cir. 1978).

The court of appeals correctly held that "[t]he Commission's action in the present case is fully consistent with each of the[ ] underlying considerations" for the filed rate doctrine. First, the "[r]etroactive application of the previously rejected rate does not undermine the ICC's primary jurisdiction in the matter of rates" because the Commission did not abandon "its supervisory role over the reasonableness" of the railroad's rate (Pet. App. 6a-7a). 453 U.S. at 577. Indeed, the Commission required the railroad to resubmit its tariff and give an additional 20 days' notice so that petitioner could protest the rate as too high. Therefore, the Commission preserved its jurisdiction over the rates. Second, the Commission was fully aware of the rate that the railroad charged and therefore the Commission's action did not undermine the filed rate doctrine's mandate "that regulated companies charge only those rates of which the agency has been made cognizant." *Arkansas Louisiana Gas Co.*, 453 U.S. at 577-578 (quoting *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976)). Finally, the court of appeals properly held that the filed rate doctrine did not bar the Commission from applying a rate retroactively in the unique circumstances presented here, where the rate was rejected because of the ICC's erroneous jurisdictional determination as opposed to an erroneous determination of the reasonableness of the proposed rate. Compare *Arkansas Louisiana Gas Co.*, 453 U.S. at 578.

3. Petitioner contends (Pet. 10-11) that the court of appeals erred in holding that the Commission has inherent equitable authority to modify rates retroactively. Contrary to petitioner's suggestion (Pet. 10), the fact that Congress

did not explicitly authorize the Commission to allow a tariff to take effect from the date the rate should have become effective, does not mean that the Commission lacks such power. As this Court held in *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. at 229, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." This is particularly true where, as here, Congress provided broad authority to the Commission to change its final decisions to correct any material errors. See 49 U.S.C. (Supp. V) 10322(g)(1) (motor carriers), 10327(g)(1) (rail carriers), and 10324(b) (general provision); Pet. App. 6a. It was not necessary for Congress to list in the agency's organic statute all of the situations in which this authority could be exercised by the Commission.[6]

In addition, pursuant to 49 U.S.C. (Supp. V) 10707(d)(2), the Commission has authority to order a shipper to pay reparations to a carrier for underpayments that result from the Commission's suspension of a rate later found to be reasonable. As the court of appeals noted (Pet. App. 6a):

> The Commission's action in the present case, in terms of cause and effect, is comparable to an order requiring the payment of reparations under section 10707(d)(2). Essentially, both are designed to rectify inequities created by prior Commission action, and the means of correcting the error in each situation involves

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[6]Petitioner contends (Pet. 11) that the Court's decision in *United Gas Improvement Co.* v. *Callery Properties, supra,* was based on the FPC's statutory authority to attach conditions on the certificates it issued. But the refund order was not based on either of the two conditions the FPC had imposed in that case; the order refunded money collected pursuant to a previously overturned unconditional certificate. 382 U.S. at 225-226. In addition, nothing in the Court's discussion of the refund order (*id.* at 229-230) suggests that it was justified by any specific statutory authority; instead, the decision is clearly based on the inherent authority of any agency, like that of any court, to do equity in particular circumstances.

payment by shippers of the rate which should have been allowed under the tariff as originally requested.

Based on these similarities, the court reasonably concluded that the Commission's order is not inconsistent with the "specific authority [to modify rates] under the Act" (Pet. App. 6a).

4. Finally, petitioner contends (Pet. 11-12) that this case is "similar" to *ICC* v. *American Trucking Ass'ns, Inc.*, No. 82-1643 (June 20, 1983), which is presently pending before this Court. The issue in that case is whether the Commission has authority to reject an effective tariff and thereby render it void if the Commission finds that the tariff filing constituted a significant violation of a rate bureau agreement.[7] The disposition of that case will depend on the scope of the Commission's rejection power under 49 U.S.C. (Supp. V) 10762(e) and the Commission's ancillary power to enforce rate bureau agreements. See 49 U.S.C. (Supp. V) 10706 and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Thus, the decision in *American Trucking Ass'ns, supra,* will not cast doubt on the ICC's equitable authority to undo the adverse consequences of mistakes it commits. Accordingly, there is no need for the Court to hold this petition pending the final disposition of *ICC* v. *American Trucking Ass'ns, supra.*

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[7]Also pending before the Court on petitions for a writ of certiorari is *Aberdeen & R.R.R. v. ICC*, Nos. 82-707 and 82-804. At issue in that case is whether the Commission has authority to reject a tariff after it has become effective because of missymbolizations in the tariff.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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